91-509

Supreme Court, U.S.
F I L E D
AUG 20 1991
OFFICE OF THE CLERK

CASE NO.

IN THE SUPREME COURT

OF THE UNITED STATES

_____TERM

ARTHUR H. KEELS, Petitioner

vs.

JOHN E. WAITES, ATTY. AND FUNDERBURK &

DERRICK, ATTYS., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE

SOUTH CAROLINA SUPREME COURT

REVIEW OF SUMMARY JUDGMENTS

ARTHUR H. KEELS

PRO SE PETITIONER

163 Pleasant View Drive

Blythewood, S. C. 29016

Phone (803) 786-1111

QUESTIONS PRESENTED FOR REVIEW

(1) The basic and underlying question is whether the Court, which is composed of attorneys, should be allowed to dispose of a case of malpractice against fellow attorneys, through the guise of Summary Judgment in complete disregard of evidence, the Law, and the Rules of Court for Summary Judgments.

(2) Does the eleventh amendment entitle the State Judiciary to blatantly deny a citizen their civil rights guaranteed by the Constitution and statutory law, with no control or censure by the Federal Government?

(3) Were the attorneys guilty of negligence?

(4) Was the Plaintiff harmed by their negligence?

(5) Would the case have been successful if they had not been negligent?

(6) Are there material facts in dispute for the malpractice case against the attorneys, and was Summary Judgment appropriate?

PARTIES TO THE PROCEEDING

I Primary Case:

Appeal from the Supreme Court of South Carolina, Docket No. 90-932.

Arthur H. Keels, Plaintiff-Appellant, Pro Se.

vs.

John E. Waites, Atty. and Funderburk & Derrick, Attys., Defendants-Respondents.

II Associated Case, involving same and closely related questions:

In the U. S. District Court for South Carolina, Civil Action No. 3:91-1570-17H.

Arthur H. Keels, Plaintiff, Pro Se.

vs.

State of South Carolina;

Hon. William T. Howell, Judge;

Chief Justice George T. Gregory,Jr.;

Assoc. Justice David W. Harwell;

Assoc. Justice A. Lee Chandler;

Assoc. Justice Ernest A. Finney, Jr.;

PARTIES TO THE PROCEEDING (CONT)

Assoc. Justice Jean Toal:

John E. Waites, Atty.;

Michael S. Church, Atty.;

Funderburk & Derrick, Attys.;

James W. Alford, Atty.;

Defendants

TABLE OF CONTENTS

	Page
Questions Presented for Review	1
Parties to the Proceeding	2,3
Table of Contents	3
Table of Authorities	4
Grounds on which the Jurisdiction of this Court is Invoked	5-7
Constitional Provisions	7-9
Statement of the Case	9-17
Argument	17-28
Appendix	1a-55a

TABLE OF AUTHORITIES

Avery v. Powell, 695 F. Supp. 632.

Copeland v. Philadelphia Police Dept., 840 F. (2d) 1139, Certiorair denied, 109 S. Ct. 1636, 104 L.Ed 2d 153.

Fine v. City of New York, 529 F.(2d) 70 (2d Cir 1975)

Haring v. Prosise, ____U.S. ____, 76 (Ed (2d) 595, 103 S. Ct. 2368 (1983).

Monell v. Dept. of Social Services, 436 U.S. 658, 56 LEd (2d) 11, 98 S. Ct. 2018 (1978)

Monroe V. Pape, 365 U.S. 167, 5LEd (2d) 492, 81 S. Ct.473 (1961).

Patsy v. Board of Regents, 457 U.S. 596, 73 LEd (2d) 172, 102 S. Ct. 2557 (1982).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

I Primary Case:

The South Carolina Supreme Court affirmed a Summary Court Judgment of the lower court on April 1, 1991 with no comment. A request for Rehearing was timely filed, but was denied with no comment on May 22, 1991.

The due process clause under which the Federal Courts review the actions of state agents is a part of the Fourteenth Amendment which was adopted in 1868. The states cannot establish standards which do not meet the minimum standards established by the federal courts or federal legislation.

II Associated case:

The Plaintiff, Arthur H. Keels filed suit in Federal Court, against the State of S.C. and the attorneys involved on May 31, 1991 for their conspiracy to deprive him of his civil rights, and requested a jury trial.

This case has not been heard, but defendants

are crying collateral estoppel and res judicata on grounds that the same issues have already been decided. However, since the primary case is being appealed, their claims have no basis until that case has been reviewed by the U. S. Supreme Court. Therefore, it is necessary that both cases involving basically the same issues be heard together.

According to Rule 10. 1 (a) of the U. S. Supreme Court Rules, this court has jurisdiction in this case because the state court of last resort has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Also, jurisdiction is involked by Rule 10.1 (b) which states: "When a state court of last resort has

decided a Federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of appeals."

CONSTITUTIONAL PROVISIONS

42 U.S.C. §§ 1983 creates a Federal Civil case of action for the recovery of damages against any person who "under color of any (state) statute, ordinance, regulation, custom, or usage" deprives another of "right, privileges, or immunities secured by the Constitution and laws" of the United States. The federal remedy created by section 1983 is completely supplemental to any state law remedy and a section 1983 claimant need not exhaust state administrative or judicial remedies before filing a 1983 suit:

Monroe v. Pape, 365 US 167, 5 LEd (2d) 492, 81 S.Ct. 473 (1961); Patsy v. Board of Regets, 457 U S. 596, 73 LEd (2d) 172, 102 S. Ct. 2557 (1982): Haring v. Prosise, ____ U.S. _____, 76 LEd (2d) 595, 103 S.Ct. 2368 (1983).

Private parties are subject to suit under section 1983 when they act in concert with, conspire with or participate with state officials in conduct the officials are constitionally forbidden to perform:

Fine v. City of New York, 529 F (2d) 70 (2d Cir 1975).

In the case of Monroe V.Pape, the Court had held that a municipality could not be sued, as they were not persons subject to damage liability. However, this holding was declared to be in error in the case of Monell v. Dept, of Social Services, 436 U.S. 658, 56 LEd (2d) 11, 98 S. Ct. 2018 (1978). This court declared that government units are liable for constitutional wrongs committed by their employees when these wrongs grow out of government"policy or custom." The Monell court, however, cautioned that "policy or custom" is broader

than officially promulgated rules and can grow o
of informal practices as well. Where a local government unit has notice of a repeated practice or pattern of unconstitutional behavior upon the part of its agents and fails to take remedial steps, its tacit approval has been found to satisfy the Monell "policy or custom" requirement.

STATEMENT OF THE CASE

The original case began when the Plaintiff, Arthur H. Keels proceeded to develop 193 Acre tract of land and two property owners began blocking the road leading to it where that road crossed their property. Mr. Keels hired John E. Waites to bring suit and prevent the offenders from blocking the road, and he lost the case. Mr. Waites refused to handle the appeal, so the Law firm of Funderburk & Derrick was hired to appeal the case, which was also lost. Mr. Keels began researching the case and found that virtually everything that had been done by the lawyers was in error; from

the searching of the title to failure to notify Mr. Keels of the State Supreme Court decision until too late for a rehearing.

Therefore, Mr. Keels brought suit in the Circuit Court of South Carolina against both attorneys for malpractice. The defendants delayed the case for two years and there were forty-four motions, pleadings, hearings, etc. During this time motions for Summary judgment or dismissal were denied to the defendants by three different judges, but each time, since they were attorneys, and I was only a Pro Se litigant, the judge let them write the Orders, and they specified without prejudice, which allowed them to just keep bringing it up. Finally, on the fourth try, they got a circuit court judge to grant them summary judgments.

Mr. Keels appealed the decision to the S. C. Supreme Court, but it was

affirmed without comment, and a rehearing was denied without comment. They did cite some cases, but the cases cited seemed to indicate that Summary Judgment should not have been granted.

Thereupon, Mr. Keels brought suit in Federal Court upon the State of S. C., the circuit court judge, supreme court judges, and all attorneys involved for a deprivation of his civil rights and asked for a jury trial. The defendants have filed their answers based on Immunity, Res Judicatea, and Collateral Estoppel. Therefore, it would be appropriate to have a review on the merits of the malpractice case first, and since the civil rights case involves related questions, it too is included in this action.

Federal questions were raised many times in the appeal of the Summary Court Judgment to the S. C. Supreme Court as shown below. However they have been ignored by the respondents and the court. There was no oral hearing

for this case, but just a decision with no comment.

In the Appellants' Notice of Intent to Appeal:

Exception No. 19 for Funderburk & Derrick: "The Court erred in finding and concluding for a Summary Judgment in favor of Defendant Derrick on eighteen issues of material facts, when the Plaintiff has demanded a Jury Trial, which is an inviolate right."

Exception No. 20 for John Waites: "The Court erred in finding and concluding for a Summary Judgment in favor of John Waites on eighteen issues of material facts, when the Plaintiff has demanded a Jury Trial, which is an inviolate right."

In the Brief of Appellant on page 2, question No. 8: "A jury trial has been demanded, and the Appellant has been denied his constitutional rights of due process of law and

the inviolate right to a trial by jury."

In Appellants' Brief, arguments for Waites, page 21: "The right of Trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be ttied by a jury, unless a jury trial be waived." (Excerpt from South Carolina Rules of Court, 1990, Rule 38 (a). The Appellant has demanded a jury trial from the very beginning, and has never agreed to anything else." In Appellants' Brief, argument for Derrick, page 32: "The Appellant has demanded a jury trial and feels strongly that his constitu= tional right to a trial by jury has been violated. Also, the 14th Amendment right to due process has been denied."

In Reply Brief for Waites page 10:

"I firmly believe that I am right in every point that I have alleged, and I also believe that I have a right to have the facts heard and decided upon a jury of my peers. The Respondents have already been turned down three times in their efforts to get this case dismissed."

In Reply Argument for Waites, page 7:

"Question V: Summary Judgment filed by Appellant has not been considered by the Court.: I have timely filed a motion for Summary Judgment "That the Road was public", and it has not been heard, argued, or considered by the Court. The reason is obvious! the Respondents have no defense at all, so they have just connived with the Court to deny me any hearing at all. This is in violation of

the South Carolina Rules of Court, and is in violation of my rights to due process of law.

The Respondents have not even offered one tiny shred of evidence as to why this Road was not public, and I have presented affidavits, testimony and maps that it was public. According to S. C. Rules of Court, Rule 56 (a), when material facts exist without substantial controversy, the Judgement shall be rendered. In this case there is no controversy at all, because, it is an undeniable fact by all standards that this road was public. This motion is lengthy, and includes many exhibits, so I won't go into the merits here, but I insist that I want my motion to be heard."

In Reply Argument for Derrick, page 15 and 16: "He knows very well that my motion for summary judgement has not been denied, because it has not evenbeen heard.

The first time my motion was scheduled to be heard by Judge Howell, he would not consider it, and would not permit me to present any argument whatsoever, even

though I pointed out that Rule 56 (a) of the South Carolina Rules of Civil Procedure gave me that right.

The next time my motion was scheduled to be heard, the Respondents approached the judge before time for the hearing, and not in my presence, and convinced him not to hear the case. It is clearly not true that my motion was denied.

The reason that they will not let it be heard is because they know I have absolute, indisputable, positive proof that the road was public, and they do not have a shred of evidence to the contrary.

Since they won't let my motion be heard, and they have no defense, it would be only right and proper that the Supreme Court consider it as a fact that the road was a public road. The motion is part

of the Transcript of Record at page 241-280."

ARGUMENT

This case seems voluminious and complicated because the defendants have employed every delay tactic that was available. However, the basic points are very simple and straightforward. The plaintiff, Arthur Keels, has alleged many serious charges of negligence on the part of both law firms and has presented positive, indisputable proof of every single charge in the form of certified copies of deeds, plats, maps, witnesses, affidavits, and other evidence. He has not charged what he did not have proof of. The defendants, on the other hand, have not and can not present any crediable evidence that would disprove a single allegation. In fact, they have admitted almost all of them in interrogatories, requests for admissions and briefs. In the first motion for summary judgment by Mr. Waites before Judge

Walter Bristow, Mr. Waites even admitted that the allegations of negligence" were sufficient to advoid dismissal". The plaintiff was required by the court to hire an attorney as expert witnesss, and the expert witness verified the negligence in virtually every instance.

The defendants, confronted with proof of negligence, have since concentrated their efforts on whether the case would have succeeded without the negligence, and that appears to be the ruling of the Summary Judgments.

Having searched the title correctly, the plaintiff has presented certified copies of deeds and plats to show that all three of the parcels of land over which the road passes were owned by the same person with the road existing

prior to severance from the highway. For over one hundred years this was the only way to get to this remaining 193 Acre tract on which the main homestead was located. I will not burden this court with the legal requirements for implied grants, prescriptive easements, and appurtenance, but siffice it to say that they were carefully detailed in briefs to the State Supreme Court. The respondents have not even challenged a single point, or attempted to question a single deed or plat reference,but yet they say that "Unity of title cannot be established from the public records of Richland County." (From Brief of Respondent John E. Waites, page 6) This is simply not true because I have supplied them with deed references and plats that show positive, indisputable proof of "Unity of title". The Summary Court has relied on their lie with nothing to support it, rather than my certified copies of deeds and plats.

In addition to positive proof of the elements of implied grant and prescriptive easement in its inception, the road was also shown on the official S. C. Highway Department maps for 23 years, whereon it was given an inventory number and designated as a public road. An affidavit from William T. Young, Director of Traffic Engineering of the S. C. Highway Dept. states that this road was recognized as public by the Highway Department, and is included in the appendix. Also, an affidavit from Goodwyn M. Hane who was the Richland County Engineer from 1965 until 1975, stating that the road was shown as public on Highway Maps and Construction Plans for 23 years, is included in the appendix. This road was as public as any dirt road in Richland County and it would have been proven so if

it had been alleged public for the right and provable reasons.

All of the foregoing has been backed up by evidential proof supplied by the plaintiff and the defendants have offered no tangible evidence to disaprove any of it. If this case has been presented right, there is no way that it could have failed. This is backed up by the testimony of Mr. Thomas Earle, the expert witness, who said:"A. In fact, looking at this case, I would have said nine out of ten times Mr. Keels would have won this case.

Q. Even on the transcript presented?

A. Yes, "(Transc. of Record, page 160, lines 12-14.) If Mr. Earle believes that I should have won nine times out of ten with the erroneous title search, erroneous pleadings, and biased judge, then there is no way I could have lost if it had been presented or appealed right.

There is no question about the gross negligence of the attorneys, and that

their negligence was the direct cause of the loss of the case, and my use o the road.

It is not only the incorrect decision that is in question here, it is the fact that the judge had no authority to weigh the issues and make a decision, especially when a jury trial had been demanded. Not only was there a dispute about every single issue, but positive, indisputable proof of every allegation was presented by the Plaintiff, and the Defendants had no credible rebuttal for any of the allegations. Any person of average intelligence could plainly see that this was a deliberate, willful, and unjustified misuse of authority for the express purpose to deprive the Plaintiff of his constitutional right to due

process of law with a trial by jury and the right to be fully heard. This is exactly what was referred to in the case of Avery v. Powell, 695 F. Supp. 632:

"Fourteenth Amendment due process rights are invoked if there is a deliberate decision by a governmental official to deprive a person of a life, liberty, or property."

The defendants have committed a serious and undeniable wrong, but are using their legal skills of cover-up, deceit, and even lying to pretend that it was legal.

However, in the case of Cppeland v., Philadelphia Police Dept., 840 F. 2d 1139, Certiorari denied 109 S. Ct. 1636, 104 L. Ed. 2d 153, the court made the observation: "Substantive component of due process clause bars certain government actions regardless of fairness of procedures used to implement them."

This is not to say that the court procedures were fair; they certainly were

not, but the defendants are trying to make them appear to be fair.

It has long been known that the South Carolina courts are so polluted, that it isn't a matter of who is right, that wins the case, but who has the trickiest lawyer or who knows the judge. It has become the custom and the policy of the court that a judge can throw a case out of court for no valid reason and violate constitutionally guaranteed rights at will with the assurance that he will be backed up by the State Supreme Court. This has added to the burden of overloaded courts, because a party clearly in the wrong has just as good a chance of winning as one who has the law on his side. If the courts were honest and fair, a party in the wrong would not bring suit, knowing that he would not be likely to

prevail.

This action can only be brought by a Pro Se litigant because every lawyer in the State of South Carolina is afraid to utter one word of criticism about a circuit judge or the Supreme Court of S. C., but privately they admit that justice in this state is a joke. Therefore, this action may correctly be catigorized as a class action for all the law-abiding citizens of the state. This situation has also resulted in a denial of my right to counsel, as every lawyer that I have approached about representing me in this case shutters at the thought, without even looking at the facts. Therefore, I, as a land surveyor who has not fully retired and no training in law, have been forced to rely only on visits to the University of South Carolina Law Library in my spare time, and my only assistance has been the librarian to point out where

the books are.

Crafty attorneys, especially in South Carolina have attempted to make the law appear complicated and beyond the abilities of the average citizen to understand. However, despite their professional skills to do so, they have not been able to obscure the plain, indisputable facts in this case. The allegations are serious, and the facts are plain, genuine,material, and are certainly in dispute. Summary Judgment was not intended for a case like this, and the Plaintiff is entitled to a jury trial of his peers.

Something urgently needs to be done about the collusion of judges and attorneys in this state to deny fundamental rights to its citizens, and there could not be a more plain and obvious case than this one.

I am not asking this court to rule on the issues, but merely to certify that there are genuine material facts in dispute in this case, and Summary Judgment was not appropriate, so that the case may be tried by a jury.

As to the second case against the judges and attorneys, a resolution of the first case as a means of relief would greatly change the issues involved. Therefore, it is proper that this associated case should be put on hold until such time as a decision is made by the Supreme Court, on Summary Judgment.

WHEREFORE, the Peititioner respectfully prays that this Honorable Court will consider this petition, and give me a chance to show to this Honorable Court that genuine material facts, are clearly in dispute in the mal-practice case against the attorneys.

Respectfully Submitted,

Arthur H. Keels

Arthur H. Keels, Pro Se

163 Pleasant View Dr.

Blythewood, S. C. 29016

Phone (803) 786-1111

September 17, 1991

INDEX OF APPENDIX

Order denying Summary	2a - 4a
Order for expert witness	5a - 8a
Order of Summary to Waites	9a - 20a
Order of Summary to Derrick	21a - 34a
Order Affirming Summaries	35a - 36a
Order Denying Rehearing	37a
Order from District Judge	38a - 51a
Affidavit from S.C. Hwy. Dept.	52a - 53a
Affidavit - Former County Engr.	54a
Hwy. Map of Richland County	55a

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

DOCKET NO. 88-CP-40-6013

(Filed April 17, 1989)

ARTHUR H. KEELS, PLAINTIFF

VS.

JOHN E. WAITES, ATTY. AND FUNDERBURK & DERRICK, ATTYS., DEFENDANTS

ORDER

This matter came before the Court for a hearing on February 15, 1989, upon motion of Defendant, John E. Waites, to dismiss pursuant to Rule 12 of the South Carolina Rules of Civil Procedure for failure to state a cause of action. At the hearing, counsel for Defendant Waites acknowledged the receipt of a supplemental pleading from the Plaintiff entitled "Answer for Motion to Dismiss or in

the Alternative for Summary Judgment" which, if read together with the Complaint, can be construed to allege particulars of negligence against Defendant Waites sufficient to avoid dismissal for failure to state a cause of action. Counsel further agreed that the Complaint be deemed amended as to Defendant Waites to incorporate by reference those allegations which appear in Paragraph 3 of the Answer for Motion to Dismiss. Matters outside the pleadings not having been considered by the Court the alternative motion for summary judgement was not before the Court and may be subsequently raised by Defendant Waites if appropriate. It is, therefore,

ORDERED that the motion of the Defendant is denied provided, however, that the Complaint shall be deemed amended as to Defendant Waites to incorporate by reference those allegations contained in Paragraph 3 of the Answer for Motion to

Dismiss or in the Alternative for Summary Judgment filed by the Plaintiff on January 18, 1989. Defendant's alternative motion for summary judgment is dismissed without prejudice.

IT IS SO ORDERED.

Walter J. Bristow, Jr.
Presiding Judge Fifth Judicial Circuit

Columbia, South Carolina

April 6, 1989

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

DOCKET NO. 88-CP-40-6013

(Filed November 9, 1989)

ARTHUR H. KEELS PLAINTIFF

VS.

JOHN E. WAITES, ATTY. AND FUNDERBURK & DERRICK, ATTYS., DEFENDANTS

This matter came before the Court on October 30, 1989, for a status conference prior to being set for trial. Present were counsel for the Defendants and the Plaintiff who is proceeding pro se. From the pleadings on file with the Court, the status conference forms submitted by the parties, and the statements of the Plaintiff during the status conference, it is apparent that the Plaintiff is alleging a claim for legal malpractice against the Defendants. It is further

apparent, from the nature of the allegations that, in order to present an issue for submission to a jury, it will necessary for the Plaintiff to present expert testimony tending to establish that the damages which he alleges were a proximate result of Defendants' negligence in failing to adhere to the appropriate standard of care within their profession. The Plaintiff, however, acknowledges that he has as of this date retained no expert and is not therefore in a position to go forward with the trial of this matter during the term of court for which it would otherwise be scheduled.

While this action was filed on December 9, 1988, and has thus been pending for almost one year, the Plaintiff is appearing pro se and in the interests of justice the Court

is inclined to grant a continuance of this case to allow the Plaintiff to retain an expert witness, and to allow the Defendants sufficient time thereafter to depose Plaintiff's expert and retain any rebuttal experts they believe necessary. The Court is of the opinion and the Plaintiff acknowledges that thirty (30) days should be sifficient time within which to retain and identify an expert to counsel for the Defendants. It is, therefore,

ORDERED that the above captioned action is continued beyond the December terms of court, provided, however, that the Plaintiff shall retain and identify to counsel for the Defendants any expert witnesses to be called by the Plaintiff at the trial of this matter on or before November 30, 1989. It is further ordered that should the Plaintiff fail to identify an expert on or before November 30, 1989, this action shall be dismissed upon the filing of an affidavit to that effect by

counsel for either Defendant; said dismissal to be without prejudice provided that the Plaintiff shall pay Defendants' costs and attorneys fees incurred in this action prior to refiling an action against the Defendants. In the event the Plaintiff shall identify an expert witness on or before November 30, 1989, counsel shall thereafter contact the Court in order to schedule a further status conference.

IT IS SO ORDERED.

Columbia, South Carolina
November 8, 1989

Edward B. Cottingham
Administrative Judge,
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

DOCKET NO. 88-CP-40-6013

(Filed May 9, 1990)

Arthur H.. Keels, Plaintiff

vs.

John E. Waites, Atty. and Funderburk & Derrick, Atty., Defendants

---

ORDER

The above entitled action was initiated by the Plaintiff appearing pro se by Summons and Complaint filed on December 9, 1988, alleging legal malpractice by the Defendants in their handling of an action to establish a road or easement claimed by the Plaintiff. More espeifically the Plaintiff alleges professional negligence against Defendant Waites in his handling of the action at the trial court level before the Master in Equity for Richland County and against

Defendant Funderburk & Derrick in the handling of the appeal from the adverse ruling at the trial court level before the Supreme Court. The Defendants have each filed motions for summary judgment which were heard on April 4, 1990. After considering the arguments of counsel and the Plaintiff and the memoranda in support and in opposition together with the pleadings, depositions, and discovery on file in the case it is apparent that there are no issues of material fact and that Defendant John E. Waites is entitled to judgment as a matter of law. By separate Order the Court likewise finds that summary judgment is appropriate as to Defendant Funderburk & Derrick.

In deciding a motion for summary judgment it is clear that

the Court must consider the evidence and the reasonable inferences arising therefrom in the light most favorable to the non-moving party. Koren v. National Home Life Assur. Co., 277 S.C. 404, 288 S.E. 2d 392 (S.C. 1982). It is likewise clear that in order to recover in an action for legal malpractice as in other actions for professional malpractice the plaintiff must present evidence as to the professional standard of care, the breach of that standard by the defendant, and damage to the plaintiff proximately resulting therefrom. Manning v. Quinn, 294 S.C. 383, 365 S.E. 2d 24 (S.C. 1988)); Floyd v. Kosko, 285 S.C. 390, 329 S.E. 2d 459 (S.C. App. 1985); Botehlo v. Bycura, 282 S. C. 578, 320 S.E. 2d 59 (S.C. App. 1984); Hughes v. Malone, 146 Ga. App. 341, 247 S.E. 2d 107 (Ga. App. 1978).

The only evidence presented by the Plaintiff in this case that could possibly create a genuine factual issue as to a breach of any standard of professional

conduct by Defendant Waites was the testimony of Thomas Earle, an attorney. Mr. Earle testified that on the record actually developed at trial by Mr. Waites, "I would have said nine out of ten times Mr. Keels would have won this case," but then went on the state that his opinion Defendant Waites was negligent in failing to allege a cause of action for an easement by implication and in connection therewith in failing to discover that unity of title existed between the servient and dominate estates through a proper title search:

Q: We've covered so much today. I know I've asked this question before, but I just want to make sure in my mind that I've covered it. As I understand it, your opinion is that the only area in which Mr. Waites' breach of the standard legal care resulted approximately in an injury

to Mr. Keels is in the area offailure to allege and pursue the easement by implication or the quasi-easement.

A. Yes, the initial drafting of the pleadings and structuring of that, and I believe that's the only one that we mentioned earlier, that and the title deal we just talked about.

Q. Okay, I think they sort of all together, do they not?

A. Yes.

Mr. Earle, the Plaintiff's only expert, also acknowledged, however, that he could not say to a reasonable degree of legal certainty that had a cause of action alleging an easement by implication been asserted the Plaintiff would have prevailed, or that the result in the case would have been any different:

Q: ... If an easement by implication had been alleged in the complaint, can you say to a reasonable degree of legal certainty that the results at the

trial level would have been different?
A: No, I cannot. I can say that if it had been raised, you would have had the opportunity to put all of your evidence, and at some point I suppose the Judge is going to make you elect what remedy you are looking for. At least you would have had the opportunity to develop your evidence beofre you ... or at least hopefully. They may make you elect ahead, some do make you elect on the front end, and it's your case and then elect, you would have the luxury of one more bite at the apple so to speak and prevailing as plaintiff.
Q: I asked you at trial level. I need to carry that one step further. If an easement by implication had been alleged, can you say to a reasonable degree of legal certainty that Mr. Keels would have ultimately prevailed in this case, and had the

roadway in question?

A: No, I cannot.

Further, it is apparent that the opinion of Mr. Earle that an easement by implication should have been asserted is based upon facts related by the Plaintiff (Earle Deposition P. 63, l. 6 - l. 22) and that if the facts were not as represented his opinion would be different (Earle Deposition p. 23, l. 17 - p. 24, l. 2). A close review of the deposition of the Plaintiff and the Plaintiff's answer to interrogatories discloses that the facts relied upon by the Plaintiff's expert are not supported by the record and that the opinion is consequently invalid and inadmissible. Mr. Earle testified that the essential elements of an implied easement included proof that the road in question existed at the time there was a severance of the dominant and servient estates from a common owner (Earle Deposition p. 61, l.

5 - p. 62, l. 25) It is clear from the testimony of the Plaintiff that the initial serverance of the dominant and servient estates is believed to have occurred in 1871 by deed of a portion of the estate of Thomas Entzminger to cynthia Bookart (Keels Deposition p. 12, l. 7 - l. 20). The Plaintiff, however, admitted during his deposition and during argument that he could not establish a complete chain of title from Entzminger to the present owners of the servient estates (Keels Deposition p. 13, l. 2 - l. 15) . Additionally, it is clear from the Plaintiff's list of witnesses and the summary of their testimony and from the list of exhibits contained in Answers to Interrogatories that he has no admissible proof that the road in question existed in 1871. There

are no witnesses who could testify from personal knowledge that the road existed in 1871 and the oldest plat listed by the Plaintiff which would be proof of the existence of the road is dated July 19, 1909. While Plaintiff also lists a plat which appears to be dated 1890 on which the road does not appear (Keels Deposition p. 15, l. 18 - p. 16, l.5). Since the evidence does not support essential elements of an easement by necessity, it could not have been negligent to fail to assert it.

The Plaintiff during argument on the motion and in his memorandum in opposition to the Defendants' motions contends that a factual issue as to the existence of the roadway in question at the time of severance of the estates is raised by a plat which is attached to the Plaintiff's memorandum as an exhibit. This plat does not

appear to be properly in the record, but further by Plaintiff's own admission the date of the plat is several years after the alleged date of the serverance ahd therefore it is not sufficient to establish an issue as to the existence and necessity of the road at the time of severance.

The case of Manning v. Quinn, 294 S. C. 383, 365 S.E. 24 (S.C. 1988), appears to be controlling. In Manning the plaintiffs submitted affidavits from two attorneys stating that in their opinion the defendant attorney "failed to exercise the degree of care, skill and prudence commonly possessed and exercised by attorneys in the State of South Carolina, and of the legal profession generally." The South Carolina Supreme Court in affirming the granting of summary judgment in favor of the defendant stated:

As a matter of law, appellants cannot recover because they cannot show that further legal action instigated by respondent most probably would have been successful.'
365 S.E. 2d at 25. In this case it is likewise clear that the Plaintiff cannot establish that he most probably would have beensuccessful had another cause of action been assoerted or had any other action been taken by Mr. Waites.

It is additionally worth noting that the Plaintiff in addition to opposing the Defendants' motions for summary judgment, moved himself for the entry of summary judgment declaring that the roadway at issue in the underlying action was a public road. It is difficult to understand how the Plaintiff can contend that as matter of law the road was a public road and also that Defendant Waites was negligent in alleging that it was a public road.

It appearing that there is no genuine issue of material fact and that Defendant John Waites is entitled to judgment as a matter of law, Defendant Waites ' motion for summary judgment is, therefore, granted.

IT IS SO ORDERED.

Columbia, So th Carolina

May 8, 1990

William T. Howell, Presiding Judge
Fifth Judicial Circuit

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

DOCKET NO. 88-CP-40-6013

(Filed May 9, 1990)

Arthur H. Keels, Plaintiff

vs.

John E. Waites, Atty. and Funderburk & Derrick, Atty., Defendants

---

ORDER GRANTING

SUMMARY JUDGMENT

This is a professional malpractice case asserted by Arthur H. Keels against the law firm of Funderburk and Derrick (hereinafter Derrick) arising out of Derrick's handling of an appeal for the Plaintiff.

This case had its origin in an earlier action in which Mr. Keels brought suit against adjacent land owners in an effort to establish a road or easement

claimed by Mr. Keels. The earlier matter was tried before the Richland County Master and Mr. Keels was represented at that time by one John Waites, an attorney practicing in Columbia. Mr. Keels lost his action and eventually sought assistance from Derrick after Keels' original attorney, Mr. Waites, left the active practice of law to take a job with the United States Bankruptcy Court. For clarification, there was no relationship between Derrick and attorney Waites.

After obtaining a transcript of the Master's trial, Derrick perfected an appeal to the South Carolina Supreme Court. He submitted a timely appellants brief and the appel was untimately heard by the Court which thereafter dismissed the appeal pursuant to its Rule 23. Mr. Keels then asserted the instant action

against his former trial attorney, Mr. Waites, and against Derrick, his appeal attorneys. This order deals solely with the action against Derrick.

Following the deposition of Mr. Keels expert witness, (attorney Thomas Earle) Derrick made a motion for summary judgment., which is the subject of this order.

A leading case in South Carolina regarding legal malpractice is Shealy v. Walters, 273 S.C. 330, 256 S.E. 2nd 739, which sets forth the elements which must be proved by Plaintiff. There must be proof of the attorney's negligence, proof that the client was damaged and proof that the attorneys negligence was at least a proximate cause of the clients damage.

With some exceptions, professional malpractice and the resulting damage must be established by expert testimony. Mali v. Odom, 295 S.C. 78, 367 S.E. 2nd 166, (SC App. 1988).

The sole question presented by Derrick's motion for summary judgment is whether or not the testimony of Plaintiff's expert witness created a genuine issue as to any material fact. See Rule 56 (c) SCRCP. I have reviewed the record, including the deposition testimony of expert Earle together with affidavits submitted on behalf of Defendant Derrick.

Mr. Earle criticizes Derrick's handling of the appeal in several particulars which I will discuss on an individual basis.

1. Earle asserted that Mr. Derrick was negligent in failing to make reference, in his brief to the Supreme Court, to the testimony of two witnesses who were favorable to the defense. Mr. Derrick commented in his brief on the favorable testimony presented by a dozen

defense witnesses. Although he did not comment on the testimony of two additional witnesses, their testimony was reproduced in the transcript and for the most part was cumulative.

It must be assumed that the Supreme Court read the entire record and was familiar with the testimony of all of the witnesses, whether touched on in the brief or not. In Floyd V. Kosko, 285 S. C. 290, 329 S.E. 2nd 459, the Supreme Court was confronted with the question of whether or not the failure of an attorney to prefect an appeal was the proximate cause of Plaintiff's injury. The court concluded that Plaintiff had the burden of proving that an appeal of the earlier case "most probably" would have been successful.

This court must now consider whether or not the Supreme Court "most probably" would have decided Mr. Keels' case

in his favor if Derrick had included in his brief some comment on the two witnesses. On his deposition, expert Earle declined to speculate as to whether or not a different conclusion would have been reached by the Supreme Court and I have concluded that there is no showing that the court would have reacted differently.

2. A Mr. Pearson had testified at trial but in a second appearance on the witness stand he made comments that arguably contradicted earlier testimony by him. When the Supreme Court, according to Mr. Keels, questioned Derrick about the testimony of Pearson, Derrick allegedly failed to point out the subsequent contradiction. The record does not reflect for a certainty any such failure on the part of Derrick but in

considering this motion for summary judgment the court must give the benefit of any doubt to Mr. Keels. Tom Jenkins Realty, Inc. v. Hilton, 278 S.C. 624, 300 S.E. 2nd 594. Once again, however, we must assume that the Supreme Court was familiar with the entire record which included both Mr. Pearson's original testimony and his subsequent claimed contradiction.

As before, Mr. Earle would not say that this ommission on the part of Derrick "most probably" affected the outcome of the appeal. This court is not able to discern any reason for believing that the Supreme Court most probably would have reached a different conclusion if Derrick had made some mention of the supposed contradiction in Mr. Pearson's testimony.

It should also be noted that the opinion of an expert must be based upon facts sufficient to form a

basis for his opinion. Young v. Tidecraft, 270 S. C. 453, 242 S.E. 2nd 671. (1978).

There is no logical basis upon which to opine that the Supreme Court would have rendered an opposite decision.

3. The Plaintiff asserts that Mr. Derrick did not notify him within ten days of the Supreme Court's decision so as to give Mr. Keels an opportunity to petition for a rehearing. Mr. Earle finds negligence in this. While there is a factual dispute as to whether or not notice was given, once again we must give Mr. Keels the benefit of the doubt and assume that the notice came too late. It should be noted that the appeal was dismissed pursuant to Rule 23 and Mr. Earle was unable and unwilling to say that a rehearing "most probably"

would have been granted and, further, he could not say that Derrick would have been able to prevail upon a member of the bar to certify that the petition for a rehearing had merit. Such a certificate, of course, is required before any petition for rehearing can be submitted. Supreme Court Rule 17.

Mr. Earle's testimony does not meet the most probable" standard and this court is unable to find any reason for concluding that the Supreme Court would likely have granted a rehearing.

4. Derrick is accused of not raising the issue of judicial bias (directed at the lower court) in his brief to the Supreme Court. The record reflects that no exception was tken during the lower court proceedings regarding any claimed bias on the part of the Master. No motion was made for a mis-trial; no motion was made for the Master to recuse himself. It is black letter

law that any exception to be argued on appeal must first have been addressed by the lower court. Kneece v. Kneece, 296 S. C. 28, 370 S.E. 2nd, 288.

I find as a matter of law that Derrick could not have created an appealable issue on a matter which was raised for the first time on appeal. There was no malpractice here and no resulting damage to the insured.

5. The Plaintiff charges that Derrick did not artange to have original exhibits, from the lower court, presented to the Supreme Court for its consideration. Specifically, Mr. Keels and his expert made reference to two highway department maps which were quite large but which were virtually

illegible when reproduced to an 8 x 11 size in the appeal record. Counsel for Derrick has presented to this court an affidavit accompanied by appropriate documents which irrefutably show that the exhibits were in fact delivered to the Supreme Court prior to the appeal hearing and then forwarded by the Supreme Court back to the lower court after the case was decided. We must again assume that the court viewed the original exhibits but if they saw fit not to do so, no blame for this can be laid at the feet of Derrick.

Although expert witness Earle would not say that any singleone of the five claimed delicts "most probably" change the outcome of the appeal, he did render the opinion that the "cummulative effect" of all five errors may have changed the outcome. He was unable, however, to render an opinion as to what the outcome would have been.

Looking at the five errors charged by Mr. Earle, number 4 and 5 as enumerated above are without merit for the reasons already addressed. I have no problem with concluding that error number 3, the failure to notify Mr. Keels of the Supreme Court's decision and his right to petition for a rehearing, is of no substance because of the extreme rarity with which the court grants petitions for rehearings, coupled with Mr. Earle's unwillingness to say that a certificate of merit could probably have been obtained from a member of the bar.

Finally, errors 1 and 2 dealing with how Derrick handled testimony of witnesses in his brief and in his oral argument, can be disregarded for the reasons already discussed. This court concludes as a matter of law

that the handling of the testimony of these three witnesses in some different manner would not most probably have altered the outcome of the appeal. We must assume, as I have already said, that the Supreme Court read the entire record and was familiar with the testimony of all of the witnesses. There is no suggestion in the record that specific comments regarding these three witnesses, by Derrick, would have caused the Supreme Court to find in Mr. Keels's favor.

My conclusion is that while there might be scant evidence of negligence on the part of Derrick (giving Keels the benefit of every doubt) the record is devoid of any probative evidence that these errors caused Mr. Keels to have anything less than a fair and equitable hearing in the Supreme Court. There is no probative

evidence that the court would have reached a different result. Accordingly, the motion of Defendant Derrick is hereby granted and this case, as to Derrick, is dismisse with prejudice.

William T. Howell, Judge

May 8, 1990

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Arthur H. Keels, Appellant,

v.

John E. Waites, Attorney and

Funderburk & Derrick, Attorneys,

Respondents.

Appeal from Richland County

William T. Howell, Judge

Memorandum Opinion No. 91-MO-93

Submitted March 12, 1990 -

Filed April 1, 1991

AFFIRMED

Arthur H. Keels, pro se appellant, of Blythewood.

Michael S. Church, of Turner, Padget, Gram & Laney, P. A. of Columbia, for John E. Waites.

James W. Alford and R. Lewis Johnson, of Barnes, Alford, Stork & Johnson, of

Columbmia, for Funderburk & Derrick.

PER CURIAM: Affirmed pursuant to Supreme Court Rule 23 and the following authorities: Baugus. v. Wessinger, Op. No. 23347 (S.C. Sup. Ct. filed February 4, 1991); Manning v. Quinn, 294 S.C. 383, 365 S.E. 2d 24 (1988); Shealy v. Walters, 273 S. C. 330, 256 S.E. 2d 739 (1979).

(Gregory) C.J.

(Harwell) A.J.

(Chandler) A.J.

(Finney) A.J.

(Toal) A.J.

Petition for Rehearing -

is denied.

(Gregory) C.J.
For the Court

Associate Justice A. Lee Chandler,

Not Participating

May 22, 1991

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

ARTHUR H. KEELS, (filed Jul 2,91)

PLAINTIFF,

Vs.

STATE OF SOUTH CAROLINA; HON. WILLIAM T. HOWELL, JUDGE; CHIEF JUSTICE GOERGE T. GREGORY; JR.; ASSOC. JUSTICE DAVID W. HARWELL; ASSOC. JUSTICE A. LEE CHANDLER; ASSOC. JUSTICE ERNEST A. FINNEY, JR.; ASSOC. JUSTICE JEAN TOAL; JOHN E. WAITES, ATTY.; MICHAEL S. CHURCH, ATTY.; FUNDERBURK & DERRICK, Attys.; JAMES W. ALFORD, Atty.;

Defendants.

Civil Action No. 3:91-1570-17H

O R D E R

The plaintiff, appearing pro se, has prepaid the statutory filing fee to file a complaint seeking damages, or

alternative relief (to set aside a judgment of a South Carolina Court of Common Plea which has been affirmed by the South Carolina Supreme Court), from the State of South Carolina itself, a state circuit judge, the five members of the South Carolina Supreme Court, one South Carolina law firm, and three South Carolina practicing attorneys. The State, the circuit judge, and the five justices, hereinafter referred to as the "state defendants", all of whom are represented by the South Carolina Attorney General, have filed a motion to dismiss this action, supported by a memorandum of law to which four exhibits (A - D) are attached. The law firm, Funderburk and Derrick, and indiviidual defendant James W. Alford, who are represented by the firm of Barnes, Alford, Stork and Johnson, have filed an answer in which four defenses are separately stated, and

asking for a dismissal of the case with costs to be taxed against the plaintiff. Individual defendants John E. Waites and Miachel S. Church, who are represented by the professional association of Turner, Padget, Graham & Laney, have also filed an answer in which four defenses are separately stated, and a fifth defense alleges that sanctions should be imposed against the Plaintiff because his complaint violates Rule 11 of the Federal Rules of Civil Procedure.

The pleadings and other material on file reveal the basis for the plaintiff's federal case. A few years ago the plaintiff retained defendant Waites who brought an action for the plaintiff in the Richland County Court of Common Pleas seeking to require two landowners to grant access by the plaintiff to land

he owned in a rural area of Richland County. The Court of Common Pleas ruled against the Plaintiff. Because Mr. Waites was no longer in private practice, the plaintiff retained the defendant law firm (Funderburk & Derrick) to appeal the case to the South Carolina Supreme Court, but for some reason not disclosed in the record that appeal was dismissed. Proceeding without counsel, the plaintiff in 1988 filed a professional malpractice action in the Richland County Court of Common Pleas against defendants Waites and Funderburk & Derrick. Defendant Michael S. Church represented Mr. Waites, and defendant James W. Alford represented the law firm. On April 10, 1990, after a period of apparently protracted pre-trial activity, defendant Judge William T. Howell granted summary judgment for the defendants in that malpractice case (Case No. 88-CP-40-6013). The plaintiff appealed Judge Howell's order, and in Keels v. Waites, et al., Memorandum

Opinion No. 91-MO-93 (April 1, 1991) the South Carolina Supreme Court unanimously affirmed under its Rule 23 the judgment entered on Judge Howell's order. The plaintiff then requested a rehearing which Chief Justice Gregory denied for the full court (except Justice Chandler) on May 22, 1991. Nine days later the plaintiff filed this federal case, alleging that he was denied due process because his malpractice action ended in a summary judgment which was incorrectly decided, and which caused him to be deprived of a jury trial as guaranteed by the Seventh Amendment to the United States Constitution.

Because the plaintiff is appearing in this case without counsel, this order is being entered to advise the plaintiff that he has a right to oppose the state

defendants' motion to dismiss. Although no motion to dismiss has been filed by the remaining defendants, the effect of their answers is substantially identical to the effect of a motion to dismiss, because both answers allege defenses that the United States District Court for the District of South Carolina has no jurisdiction to award relief to the plaintiff, that the complaint fails to state a claim upon which relief can be granted, and that the plaintiff should be required to pay the costs incurred by the defendants, including their attorneys' fees. [1]

---

[1] A copy of Rule 11 of the Federal Rules of Civil Procedure and a copy of 42 U.S.C. § 1988 are attached to this order for the information of the plaintiff. All the defendants he has named request an award of costs, which under § 1988 may include a reasonable attorney's fee if a suit is

It cannot be stressed too strongly to the plaintiff that he should seek legal advice to counsel him about whether he sould oppose the various defenses set up by all the defendants he has sued. If the plaintiff chooses to not consult a competent attorney, it would be futile for him to ask the court to appoint him an attorney, for no attorney will be appointed in a case seeking damages for the alleged violation of a person's civil rights unless strongly persuasive reasons are perceived by the court to do so, and no such reasons are apparent in this case. If the plaintiff does not consult an attorney, then he should make it a first order of business to read the cases cited by the state defendants before attempting to respond to the motion to dismiss, for he can see from those cases why he may be exposing himself to serious financial

sanctions if he argues against principles of law that are settled by the cases the state defendants have cited.(These cases are also con rolling on some of the defenses alleged by the other defendants.) If the plaintiff lacks private acdess to a law library, he can read the cases cited by the state defendants in either the law library at the University of South Carolina Law school, or the libraries of the South Carolina Supreme Court and the South Carolina Court of Appeals. [2]

---

[1](... continued)

based, as this one is, on the remedial provisions of 42 U.S.C. S 1983 (i.e., an alleged violation of federal rights by someone who acted under color of state law).

If the plaintiff fails to oppose the requests of all defendants that his case be dismissed, and that he be ordered to pay theattorneys' fees of the defendants, or other possible monetary sanctions, the court will dismiss this case, and it may impose sanctions under Rule 11 or award attorneys' fees under 42 U.S.C. § 1988. Even if the plaintiff does oppose a dismissal of his case, this will not guarantee that this case will not be dismissed, or that no sanctions will be imposed.

The plaintiff's particular attention is called to cases cited by the state defendants which explain Eleventh Amendment immunity, judicial immunity, claim preclusion, and the lack of authority for a United States District Court to act as an appellate court to review decisions by South Carolina courts. The plaintiff may

not agree with these decisions, but they are as binding on him as they are on all other litigants. As for the attorneys sued, the law is also firmly established that an attorney cannot be sued for violating a former clients civil rights, or the right of a former adversary of a client, for the simple reason that an attorney does not act under color of state law, such action being a jurisdictional prerequisite to a case brought under 42 U.S.C. S 1983.

The plaintiff will have until July 26, 1991, to file with the clerk's office any material he wants to file to oppose all the defendants' responses to his complaint. An exact copy of whatever the plaintiff files for the court to review must be served on the attorneys for all the defendants, which may be done by mail addressed to each such attorney. Each defense attorney will then have until August 5, 1991, to reply (if desired)

to the plaintiff's material. The plaintiff's response may consist of his own affidavit, affidavits of others, attested copies of exhibits, and/or a legal argument. If a legal argument cuting cases is sumbitted, care should be exercised to cite such cases accurately.

IT IS SO ORDERED.

Columbia, South Carolina

July 2, 1991

s/Charles W. Gambell
Charles W. Gambell
United States Magistrate
Judge

(Copies R. 11 and S 1988 attached)

---

[2]The library at the Law School is open during evenings and on weekends,' but the two court libraries are not.

[3]Litigants who disagree with judges decisions can appel such decisions, but they cannot sue judges. If the plaintiff will only take the time to

read Stump v. Sparkman, 435 U.S. 349 (1978), he will see why the principle of judicial immunity from liability for damages has become imbedded into American law.

[4] See, e.g. Deas v. Potts, 547 F.2d 800 (4th Cir. 1976). A legal malpractice suit against an attorney (or attorneys) can be filed in a federal court only if the plaintiff and the attorney (s) sued are residents of different states, but even then if a state court has decided the same claims, or any which could have been asserted, the federal court will throw the case out because of the principle of a collateral estoppel, in all probabilty.

[5] The advice imparted herein to the pro se plaintiff should not be construed by the plaintiff as an attemptto prejudge this case, for that is not the intent. The intent of this order is to advise the plaintiff of his right to respond,

and to prescribe a time limit for him to do so. The urgency of the suggestion for the plaintiff to consult an attorney, or to at least read the cases cited by the South Carolina Attorney General, is based solely on the fact that the plaintiff may not fully appreciate that a lawsuit brought in bad faith, even by one not schooled in the law, is inviting pecuniary reprisals. Federal courts with increasing frequency are ordering sanctions against persons who file cases against defendants merely to harass them, or to require them to incur the costs of defending a lawsuit that is baseless under settled law. The principles of immunity, claim preclusion, and want of jurisdiction are so firmly established by the United States Supreme Court that it would

be frivolous for a litigant (under Rule 11) to ask a United States District Court to extend, modify, or reverse "existing law" concerning these principles.

DEPARTMENT OF HIGHWAYS AND PUBLIC
TRANSPORTATION
P. O. BOX 191
COLUBMIA, S. C. 29202

AFFIDAVIT

I, William T. Young, do hereby certify to the following:

(1) That the road, known as Eargle Road, and located near the South West corner of the intersection of Highway 321 and Highway 1682 in Richland County has been shown as a Public Road on several General Highway Maps for Richland County from 1939 until 1962.

(2) That this road is shown to have had a Rural Road Inventory

Number of #537 on the 1951 S. C. Hwy. Dept. General Highway Map.

(3) That this road was indicated as a "County Road" on Sheet No. 20 at Station 541+64 on Construction Plans by the S. C. Highway Dept. for State Route 218 (now known as Hwy. 321) dated 4/20/48.

Sworn to and subscribed before me this 30th day of March, 1990.

(Kathryn C. Brown)
Notary Public

My commission expires 7-29-95

William T. Young, Dir.
of Traffic Engineering,
S. C. Hwy. Dept.

AFFIDAVIT

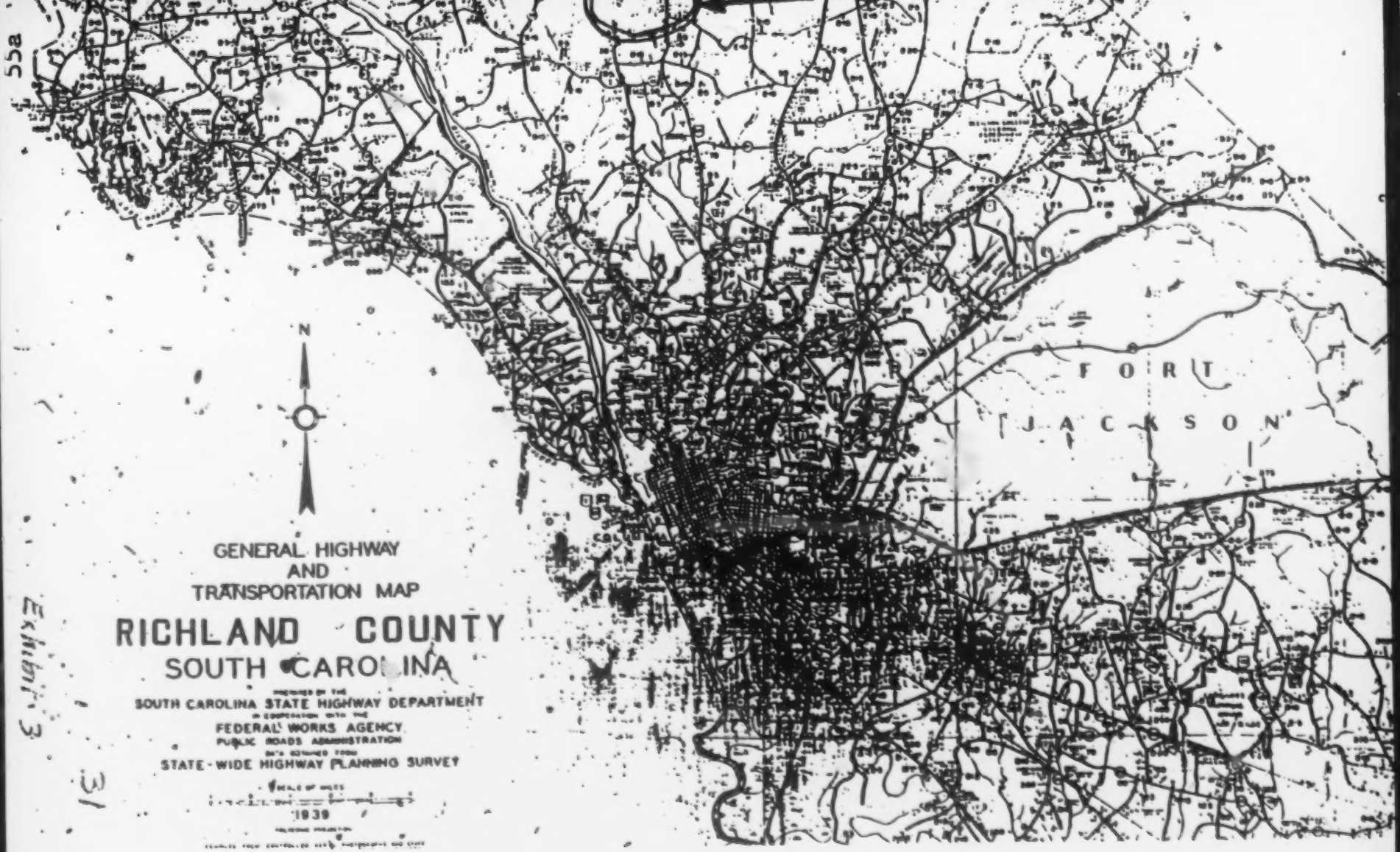
This is to certify that I, Goodwyn M. Hane, worked for the South Carolina Highway from 1949 until 1965 as Maintenance Engineer for Richland County, and then with Richland County as the County Engineer from 1965 until 1975. In reviewing S. C. Hwy. Map of Richland County, I find the road known locally as Eargle Road, located near the intersection of Highway 321 and Cedar Creek Road, shown as a Public Road on the 1939 and 1951 Maps. Also shown as a "County Road" on construction plans of Highway 321.

Sworn to and subscribed before me this 30th day of March, 1990.

Jennie S. Sharpe
Notary Public
My commission expires 9-9-97

Goodwin M. Hane
Reg. Civil Eng. # 3579

BEST AVAILABLE COPY



55a

Exhibit 3